

1993

Edwin F. Guyon v. Fibro Trust : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930285

IN THE UTAH COURT OF APPEALS

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EDWIN F. GUYON 930285-CA - Court of Appeals
plaintiff/appellee 92016413-CV - District Court

vs.

FIBRO TRUST Priority Argument
defendant/appellant Classification 15

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BRIEF OF PLAINTIFF/APPELLEE

EDWIN F. GUYON

* * * * *

APPEAL FROM A FINAL ORDER OF THE THIRD CIRCUIT COURT
SALT LAKE COUNTY, UTAH

* * * * *

THE HONORABLE MICHAEL L. HUTCHINGS PRESIDING

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Classification 15

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LIST OF PARTIES

(A) Edwin F. Guyon (plaintiff) - an attorney licensed to practice law in the state of Utah.

(B) Fibro Trust (defendant) - a trust doing business in the state of Utah through its agent Donald H. Pickett and George Badger, a twice convicted federal felon (pp.72-79).

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JURISDICTION OF THE COURT

The court of appeals has jurisdiction of this action pursuant to the provisions of sec. 78-2a-2(d), Utah Code Annotated and Rules 3 and 4, Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

Whether the circuit court abused its discretion in failing to grant defendant's motion to set aside the default judgment herein rendered.

STATUTES WHOSE INTERPRETATION IS DETERMINATIVE

Rule 55(c), Utah Rules of Civil Procedure

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b)(1), Utah Rules of Civil Procedure

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (7) any other reason justifying relief from the operation of the judgment. . . . A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation.

STATEMENT OF THE CASE

This is an appeal from a court order denying defendant's motion to set aside a default judgment.

STATEMENT OF FACTS

1. Prior to May 14, 1991, plaintiff, subsequent to negotiation with George Badger, agreed to provide certain legal services for and on behalf of George Badger, Leasing Technology Incorporated, and Fibro Trust at the rate of \$100 per hour plus

costs and expenses with the provision that, should there be a failure to timely pay said billings, additional services would be billed at the rate of \$150 per hour. (pp. 25, 49)

2. In response to the below referenced billings certain payments were made, save and except for those outstanding at the time of the filing of the complaint herein. (pp. 25, 49)

3. On October 26, 1991, pursuant to instructions received from George Badger, plaintiff submitted a billing for legal services rendered to Mr. Philip Johnson, c/o Leasing Technology, Inc., 50 West Broadway, #1000, Salt Lake City, Utah, 84101. (exhibit A) (pp. 25, 31-32, 49)

4. On February 14, 1992, pursuant to instructions received from George Badger, plaintiff submitted a billing for legal services rendered to Mr. Philip Johnson, c/o Leasing Technology, Inc., 50 West Broadway, #1000, Salt Lake City, Utah, 84101. (exhibit B) (pp. 26, 33-35, 49)

5. On May 8, 1992, pursuant to instructions received from George Badger, plaintiff submitted a billing for legal services rendered to George Badger, 550 Northmont, Salt Lake City, Utah, 84103. (exhibit C) (pp. 26, 36-37, 49)

6. On July 6, 1992, pursuant to instructions received from George Badger, plaintiff submitted a billing for legal services rendered to George Badger, 550 Northmont, Salt Lake City, Utah, 84103. (exhibit D) (pp. 26, 38, 49)

7. On October 20, 1992, pursuant to instructions received from George Badger, plaintiff submitted a billing for

legal services rendered to George Badger, 550 Northmont, Salt Lake City, Utah, 84103. (exhibit E) (pp. 26, 39, 49)

8. On November 3, 1992, pursuant to instructions received from George Badger, plaintiff forwarded notice of the continued failure to make payment for legal services rendered and notice of withdrawal from pending litigation to George Badger, 550 Northmont, Salt Lake City, Utah, 84103. (exhibit F) (pp. 26, 40-41, 49)

9. On November 13, 1992, pursuant to instructions received from George Badger, plaintiff submitted information regarding status of current litigation and submitted a billing for legal services rendered to George Badger, 550 Northmont, Salt Lake City, Utah. 84103. (exhibit G) (pp. 26, 42-44, 49 and 18-20, 48)

10. On November 20, 1992 George Badger forwarded a letter to plaintiff indicating the existence of "misunderstandings" regarding the payment of fees for legal services rendered. (exhibit H) (pp. 27, 45, 49 and 21, 48)

11. On November 25, 1992 plaintiff filed the instant action seeking payment for legal services rendered and for which payment had not been received. (pp. 27, 1)

12. On November 28, 1992 defendant was served with summons and complaint. (pp. 27, 2)

13. On December 8, 1992 defendant forwarded a letter to plaintiff stating defendant's position regarding the payment of legal fees for services rendered. (exhibit I) (pp. 27, 46, 49)

14. On December 29, 1992, based upon the failure of

defendant to answer plaintiff's complaint, the court entered judgment in favor of plaintiff. (p. 5)

15. On February 17, 1993, plaintiff became aware said judgment had been entered and forwarded to defendant a notice of judgment and affidavit of costs. (pp. 6, 7)

16. On February 23, 1993 defendant forwarded to plaintiff its motion to set aside default judgment and accompanying memorandum. Said motion/memorandum does not set forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered. (p. 9ff)

17. On April 6, 1993, and subsequent to notice and hearing, the circuit court entered its order denying defendant's motion to set aside default judgment. (p. 56)

SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion in denying defendant's motion to set aside the default judgment rendered herein.

Defendant does not demonstrate upon the record any of the following:

A. good cause to set aside entry of default or default judgment;

B. a defense of at least ostensible merit to justify trial on the issues;

C. mistake, inadvertence, surprise, or excusable neglect;

D. that illness alone is a sufficient excuse to set aside a default judgment; or

E. lack of indifference or diligence in pursuing the opportunity to defend the action.

as contemplated by the statutes and cases herein cited.

ARGUMENT

1. Rule 55(c), Utah Rules of Civil Procedure provides that:

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). [emphasis added]

2. A party seeking to set aside a default judgment must proffer a defense of at least ostensible merit to justify a trial on the issues. Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976).

3. Rule 60(b)(1), Utah Rules of Civil Procedure provides that:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (7) any other reason justifying relief from the operation of the judgment. . . . A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation.

4. It is discretionary with the trial court to determine whether movant shows, "mistake, inadvertence, surprise, or excusable neglect". Larsen v. Collina, 684 P.2d 52 (Utah 1984).

5. Illness alone is not a sufficient excuse to make neglect in failing to defend a cause of action a ground for vacating even a default judgment. Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1984).

6. Sustaining a default judgment is proper where statements and/or actions of defendant demonstrate indifference and lack of diligence in pursuing the opportunity to defend and action. Russell v. Martell, 681 P.2d 1193 (Utah 1984).

7. In order to obtain relief from a default judgment, a defendant must show not only that the judgment was entered through a reason specified in Rule 60(b), but also the existence of a meritorious defense. A meritorious defense is defined as being one which sets forth specific and sufficiently detailed facts which, if prove, would have resulted in a judgment different from the one entered. State ex rel. Utah State Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983).

CONCLUSIONS

Defendant Fibro Trust's appeal should be dismissed with prejudice and the judgment and orders entered by the third circuit court should be affirmed for the following reasons:

The circuit court did not abuse its discretion in denying defendant's motion to set aside the default judgment rendered herein.

Defendant is not entitled to relief from the judgment entered December 29, 1992 pursuant to Rule 60(b)(1) on the grounds of mistake, inadvertence, surprise, or excusable neglect.

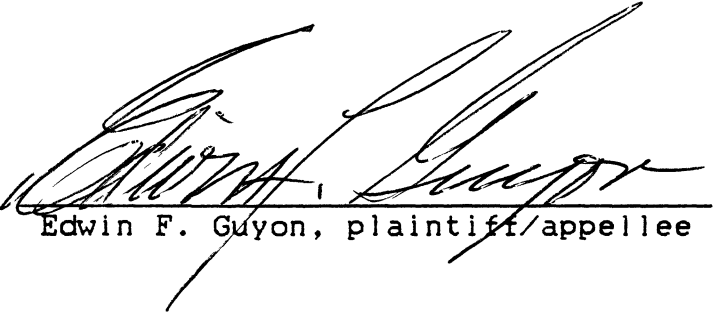
Defendant is not entitled to relief from the judgment entered December 29, 1992 pursuant to Rule 60(b)(7).

Defendant is not entitled to relief from the judgment entered August 27, 1992 pursuant to its Rule 60(b) claim of ill health alleged on behalf defendant trust's agent.

Defendant has not presented facts sufficient to demonstrate a meritorious defense and is not entitled to relief from the judgment herein entered.

Dated the 25th day of October, 1993.

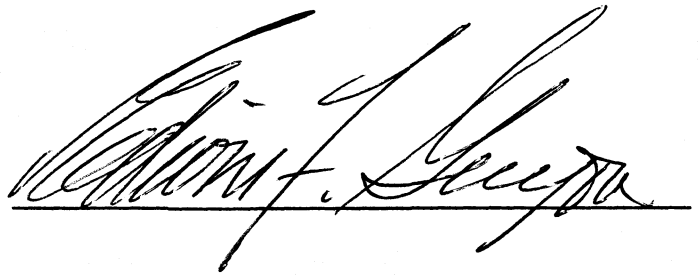
By:



Edwin F. Guyon, plaintiff/appellee

CERTIFICATE OF SERVICE

I hereby certify that on the above date I hand-delivered an original and eight (8) copies of the foregoing brief of plaintiff/appellee to the clerk of the court of appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah, 84102 and two (2) copies were mailed to Mitchell R. Barker, Esq., 349 East 200 South, #170, Salt Lake City, Utah, 84111.

A handwritten signature in cursive script, reading "Cliff Leeper", is written over a horizontal line.